Supreme Court, U.S.
FILED
JAN 8 1991
F. SPANIOL, JR.
CLERK

No. 90-5319

In The
Supreme Court of the United States
October Term, 1990

PAUL McNEIL,
Petitioner,

— against —

STATE OF WISCONSIN,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

(List of Counsel on Inside Front Cover)

OF COUNSEL:

GREGORY U. EVANS, ESQ.
General Counsel
National Sheriffs' Association
1450 Duke Street
Alexandria, Virginia 22314

DANIEL B. HALES, ESQ.
Peterson, Ross, Schloerb
and Seidel
President,
Americans for Effective
Law Enforcement, Inc.
Chicago, Illinois 60656

GEORGE D. WEBSTER, ESQ.
International Association of
Chiefs of Police, Inc.
1110 N. Glebe Road, Suite 200
Arlington, Virginia 22201

JACK E. YELVERTON, ESQ.
Executive Director,
National District Attorneys
Association, Inc.
1033 N. Fairfax Street
Alexandria, Virginia 22314

FRED E. INBAU, ESQ.
John Henry Wigmore Professor
of Law, Emeritus
Northwestern University
School of Law
General Counsel,
Americans for Effective
Law Enforcement, Inc.
Chicago, Illinois 60611

WAYNE W. SCHMIDT, ESQ.
Executive Director
BERNARD J. FARBER, ESQ.
Research Counsel,
Americans for Effective
Law Enforcement, Inc.
5519 N. Cumberland
Avenue, #1008
Chicago, Illinois 60656

JAMES P. MANAK, ESQ.
Counsel of Record,
421 Ridgewood Avenue
Suite 100
Glen Ellyn, Illinois 60137
Tele: (708) 858-6392
Fax: (708) 858-6392

Counsel for Amici Curiae

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This brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner and the Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty times in the Supreme Court of the United States and over thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal, and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America,

consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of conducting interrogations within the bounds of the law, and (2) prosecutors and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

ARGUMENT

THE DEFENDANT'S ACCEPTANCE OF THE ASSISTANCE OF COUNSEL AND APPEARANCE WITH COUNSEL AT AN INITIAL HEARING ON THE CHARGED OFFENSE DID NOT CONSTITUTE AN INVOCATION OF THE FIFTH AMENDMENT RIGHT TO COUNSEL THAT PRECLUDED POLICE INITIATED INTERROGATION ON AN UNRELATED, UNCHARGED OFFENSE WHILE DEFENDANT WAS IN CONTINUOUS CUSTODY.

Amici will not discuss at length the case law analysis of the parties in this case. Instead, we will concentrate upon policy issues raised in it and our need as law enforcement administrators and concerned members of Society to (1) ensure that the police receive adequate, understandable court guidance as to what is, and what is not, legally permissible in their interrogations of criminal suspects, and (2) to call attention to the practical and endangering difficulties that would ensue if this Court were to adopt the contention made by the defendant.

The Supreme Court of Wisconsin ruled that the acceptance by Petitioner ("defendant") of the assistance of counsel and appearance with counsel at his initial court appearance did not amount to an invocation of the Fifth Amendment right to counsel that would, under the rule in *Edwards v. Arizona,* 451 U.S. 477 (1981), bar subsequent police-initiated interrogation on an unrelated, uncharged offense while the defendant remained in custody. *State v. McNeil,* 155 Wis.2d 24, 454 N.W.2d 742 (1990).

It is now clear that when a suspect whom the police wish to subject to custodial interrogation invokes his right to counsel, under the rule in *Edwards* any further police-initiated questioning about the charged offense is a violation

of the prophylactic rule laid down by this Court in *Miranda v. Arizona,* 384 U.S. 436 (1966). However, a question that has often been raised after *Edwards* has been whether the bar applies to police interrogations about other crimes, different from the ones that were the focus of the original interrogation.

The lower courts have been divided on this issue. Compare *United States ex rel. Espinoza v. Fairman,* 813 F.2d 117 (7th Cir. 1987) (yes), and *State v. Preston,* 555 A.2d 360 (Vt. 1988) (yes), with *Butler v. Aiken,* 846 F.2d 255 (4th Cir. 1988) (no: rule of *Roberson* held not retroactively available. 490 U.S. ____, 108 L.Ed.2d 347). The United States Supreme Court resolved this issue in *Arizona v. Roberson,* ___ U.S. ___, 108 S.Ct. 2093 (1988), in favor of accused persons, but did so in the context of the Fifth Amendment right to counsel (stationhouse interrogation) rather than the Sixth Amendment right to counsel (interrogation after the commencement of judicial proceedings).

In *Roberson* this Court laid down a rule prohibiting police-initiated questioning regarding any criminal conduct after a defendant had invoked his Fifth Amendment right to counsel in the interrogation process. The *Edwards* rule was to apply, the Court made clear, even when a different law enforcement officer seeks to question the suspect about a different crime without knowing that the suspect previously requested counsel in the interrogation process. The *Roberson* Court reasoned that once the suspect requests counsel, he has indicated clearly that he does "not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney." The Court noted that "there is no reason to assume that a suspect's state of mind is in any way investigative-specific."

The *Roberson* Court made two clear distinctions for situations *not* covered by its ruling.

The *first* was the situation where a suspect in custodial interrogation has invoked his Fifth Amendment right to *silence* under *Miranda*, as opposed to his right to *counsel*. The Court had previously ruled in *Michigan v. Mosley*, 423 U.S. 96 (1975), that police re-initiation of questioning about a separate crime, could still be consistent with the obligation to "scrupulously honor" a suspect's right to terminate questioning. This distinction simply carries forward the rule adopted in *Mosley* and prevents *Roberson* from being in conflict with *Mosley*.

The *second* distinction, which is relevant to the instant case, pertained to the situation where a suspect's Sixth Amendment right to counsel had attached upon the initiation of the formal adversary process, but the suspect's Fifth Amendment right to counsel under *Miranda* had not yet attached because the suspect was not in custody and presently subjected to police interrogation. This distinction was intended to cover the situation first illustrated in *Massiah v. United States*, 377 U.S. 201 (1964), and most recently applied by this Court in *Illinois v. Perkins*, ___ U.S. ___, 110 S.Ct. 2394 (1990).

Roberson is limited to those situations where a suspect in custody has invoked the *Fifth Amendment* right to counsel under *Miranda*.

Amici further note that this Court's very latest pronouncement on the subject in *Minnick v. Mississippi*, ___ U.S. ___, 111 S.Ct. ___, 48 CrL 2053 (December 3, 1990), in which the Court ruled that once a suspect in custody has invoked his Fifth Amendment right to counsel, thus triggering the rule in *Edwards*, he cannot be interrogated again in the absence of counsel (unless the suspect initiates the interrogation process) regardless of whether the suspect has consulted with an attorney in the meantime, is also consistent with this parallel development and works no change in it.

The Wisconsin Supreme Court correctly refused to take the *Roberson* rule beyond its express Fifth Amendment application, "to include extension of the sixth amendment invocation of [the] right to counsel to shield the defendant from postarraignment interrogation on unrelated charges." 454 N.W.2d at 748. It joined several other courts in reaching this conclusion on similar facts, including the Supreme Court of Michigan in *People v. Crusoe*, 433 Mich. 666, 449 N.W.2d 641 (1989).

This distinction, *amici* submit, is also grounded on common sense realities. A request for counsel at an initial court appearance, as opposed to during police interrogation, signifies only that the defendant wants counsel for that particular offense. This right is clearly accorded to him by the Sixth Amendment and, as applied, fortifies him from any further police interrogation with respect to the particular crime for which he has been charged and arraigned. However, even as to that crime, the defendant has the privilege of refusing further legal representation at trial, and of even rejecting legal representation that might avoid imposition of the most severe sanction that Society can apply—the death penalty. *Gilmore v. Utah*, 429 U.S. 1012 (1976).

Moreover, an accused person, in exercising his right to counsel regarding the charged offense, might not even be considering other offenses he may have committed, or for which he might be charged. Indeed, he might not even want his own attorney to know about them, since that might diminish counsel's enthusiasm for effective representation at trial on the present charge.

It is also conceivable that with regard to other offenses a suspect may harbor the thought that he will be able to explain away the suspicion of guilt as to them, on the basis of self-defense, alibi, or mistaken identification. In other words, as to those offenses a presently charged offender may

exonerate himself to the police without being charged and having to stand trial. *Amici* further note that a large percentage of criminal offenders have committed other crimes. As to these, the police should not be foreclosed from questioning about such other offenses.

Amici submit that to accept the contention of the defendant in this case would amount to an immunization of a substantial percentage of criminal offenders from *any* questioning by the police. There are in fact enough such protections presently available to them; the public safety decries the erection of additional ones. As Justice Potter Stewart stated in *Michigan v. Mosley, supra,* at 103: "A blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation would transform *Miranda* safeguards into wholly irrational obstacles to legitimate investigative activity."

As some have noted, the cost of maintaining *Miranda* has been very high for the administration of justice in America. Inbau and Manak, "Miranda v. Arizona—Is It Worth The Cost? (A Sample Survey With Commentary of the Expenditure of Court Time and Effort)," 24 Cal. West. L. Rev. 185 (1988). We see no need to enlarge the scope of that decision as defendant would have this Court do in this case.

CONCLUSION

Once again evidence has been presented of the adverse impact of *Miranda v. Arizona* on trial courts and the many appellate courts which should be spared the diversion of their primary responsibility of making reasonably possible the conviction of the guilty and affording adequate protection to the *innocent*. Overzealousness in implementing the prophylactic rules of *Miranda*, as would be true in the present case setting, should be discouraged by this Court. Beyond that, we respectfully suggest that there be a modification to

Miranda's mandate by simply requiring that persons in police custody be warned of the right to remain silent (period!). **At the very least, this Court should not add to the confusion by entertaining the defendant's argument for blurring the distinctions that presently exist between the Fifth and Sixth Amendment rights to counsel.**

Respectfully submitted,

OF COUNSEL:

GREGORY U. EVANS, ESQ.
General Counsel
National Sheriffs' Association
1450 Duke Street
Alexandria, Virginia 22314

DANIEL B. HALES, ESQ.
Peterson, Ross, Schloerb, and Seidel
President,
Americans for Effective Law Enforcement, Inc.
Chicago, Illinois 60656

GEORGE D. WEBSTER, ESQ.
International Association of Chiefs of Police, Inc.
1110 N. Glebe Road, Suite 200
Arlington, Virginia 22201

JACK E. YELVERTON, ESQ.
Executive Director,
National District Attorneys Association, Inc.
1033 N. Fairfax Street
Alexandria, Virginia 22314

FRED E. INBAU, ESQ.
John Henry Wigmore Professor of Law, Emeritus
Northwestern University
School of Law
General Counsel,
Americans for Effective Law Enforcement, Inc.
Chicago, Illinois 60611

WAYNE W. SCHMIDT, ESQ.
Executive Director
BERNARD J. FARBER, ESQ.
Research Counsel,
Americans for Effective Law Enforcement, Inc.
5519 N. Cumberland Avenue, #1008
Chicago, Illinois 60656

JAMES P. MANAK, ESQ.
Counsel of Record,
421 Ridgewood Avenue
Suite 100
Glen Ellyn, Illinois 60137
Tele: (708) 858-6392
Fax: (708) 858-6392

Counsel for Amici Curiae